IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 2038 of 1983
with
CROSS OBJECTIONS NO. 36 OF 2002

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GOVT. OF GUJARAT

Versus

R L KALATHIA & CO.

Appearance:

1. First Appeal No. 2038 of 1983
MR. M.K.PATEL, AGP for Petitioner No. 1
MS MAYA N BHAVNANI for Respondent No. 1

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE H.K.RATHOD

Date of decision: 07/10/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE H.K.RATHOD)

Heard learned Assistant Government Pleader Mr.M.K. Patel for the appellant State of Gujarat; Mr.G.T.Dayani for Ms. Maya Bhavnani for the respondent original plaintiff. In this first appeal, the appellant original defendant has challenged the judgment and decree passed by the Civil Judge, (S.D.), Jamnagar in Special Civil Suit NO. 30 of 1977 dated 14th December, 1982 wherein the trial court has directed that the plaintiff shall recover from the defendant a sum of Rs.2,27,758.00 with proportionate costs and interest at the rate of 6 per cent per annum from the date of the suit till realization in full. Under the said decree, the appellant original defendant was directed to bear its own costs.

Brief facts leading to the filing of the present appeal are to the effect that the present respondent original plaintiff entered into an agreement with the Executive Engineer, Irrigation Division, Jamnagar for the work of construction of Earthen Dam, Wasterweir and outlet of Fulzer II Irrigation Scheme. Said contract was entered into B-2 Form which is a usual Public Works Department's Form. Said agreement contains mutual bilateral reciprocal contractual obligation on the part of the parties. The plaintiff was required to perform certain works and certain obligations were also put up on the shoulder of the defendant. The plaintiff claims that it completed the work in all aspects on30.8.1973 and this date has been considered as a date of completion of the said work by the defendant also. Then, the defendant was required to prepare final bill as per Clause 8 of the said Contract and the payment thereof was required to be made on or before 31st March, 1974. As per the averments made by the plaintiff in the plaint, said bill was actually prepared and was accepted by the present plaintiff under protest because according to the case of the plaintiff, said bill did not represent true and correct picture of the payment, measurements etc. It has also been alleged that on referring to the said final bill, the plaintiff come to know for the first time that certain disputes were raised by the defendant in the said final bill dated 31.3.1974; that even during the execution of the work, certain claims cropped up and they were put forward by the plaintiff before the defendant but after a protracted correspondence, the things were

not settled. Therefore, according to the plaintiff, since the final bill was paid on 31.3.1974, the plaintiff came to know that the said disputes would not be settled by the defendant and, therefore, the plaintiff has filed the said suit before the trial court for recovery of the amount of 3,66,538.05 ps. against the defendant on the following heads :

Rs.3600.00 For executing the extra work of change.

Rs.1800.00 In connection with COT Filling additional depth at the rate of Rs.1.00 per claim No.1.

Rs.15625.00 In connection with excavated stuff.

Rs.7585.00 In connection with the guide bunds which were considered for the payment in the Running Account Bills but abandoned from the payment of the Final Bill.

Rs.5640.00 In connection with excavation for pitching work.

Rs.13244.00 In connection with providing sand filte in river portion.

Rs.1375.00 In connection with waste weir back filling.

Rs.30600.00 In connection with less rate paid for extra item of masonary.

Rs.14339.84 On account of breach of condition for irregular payments for which3/4 % of rebate was given.

Rs.12386.64 In connection with providing very excessively heavy gate than that of required as per the design.

Rs.137478.17 Due to exclanation on account of rising of price in materials labour wages during the period of one year due to statutory rise in excise duty etc.

Rs.30000.00 On account of establishment charges during the period from 1.8.1972 to 31.8.1973.

Rs.93,049.76 Towards interest.

Rs.3,66,538.05 Total claim as per aforesaid heads.

The suit of the plaintiff was resisted by the defendant by filing written statement at Exh. 13 before the trial court wherein it has been contended that the plaintiff has no cause of action for filing the suit; that the notice under section 80 of the Code of Civil Procedure is defective and, therefore, the suit is liable to be dismissed; that the agreement has taken place in Form B-2 between the parties. It has been denied that the plaintiff has completed the work in question in all respects on 30.8.1973. The defendant has also denied

that it has considered this date to be the date of completion of work by the plaintiff. It has also been denied that the final bill did not contain true and correct picture of payment and measurement. It has also been denied that the under payment has been made to the plaintiff. It has been submitted that as per clause 10 of the Contract, all the Running Account Bills were required to be submitted by the contractor and if he did not do so, the Engineer in charge can prepare the bill which would bind the contractor also. It has also been contended that as per clause 8, final bill was also required to be submitted within one month from the date of completion of work otherwise the Engineer in charge can charge certificate of measurement of the work to be treated as final and binding. It has been contended that the plaintiff never submitted any Running Account Bills ("RA Bills" for short) and, therefore, the Dy. Engineer had prepared such RA Bills from time to time. According to the defendant, even the Final Bill was also not prepared by the plaintiff and the same was prepared by the Engineer of the defendant and it was signed by the plaintiff in token of acceptance. According to the defendant, since the plaintiff has accepted the payment of RA Bills and the Final Bills, the plaintiff is guilty by not preferring RA Bills and Final Bills. It has been denied that there is no provision for performance of contractual obligation. It has also been denied that the defendant has not considered the claims of the plaintiff but as per the case of the defendant, it has scrutinized all the claims properly and due amounts were paid to the plaintiff either in the RA Bills or in the Final Bill. The defendant has also raised contention in its written statement that the RA Bills or the Final Bills were prepared by the defendant's Engineer after scrutinizing relevant record and the same were accepted and signed by the original plaintiff and, therefore, the plaintiff is estopped from challenging the contents of the said bills. According to the defendant, all the claims of the original plaintiff were properly scanned and scrutinized and appropriate decision has been taken on merits and, therefore, according to the defendant, original plaintiff is not entitled to bring the suit. According to the defendant, the suit is barred by the law of limitation and the civil court has no jurisdiction to entertain the claim of the plaintiff and, therefore, suit of the plaintiff is required to be dismissed.

On the basis of the pleadings before it, the trial court has framed 18 issues as per Exh. 16.

Before the trial court, on behalf of the original

plaintiff, one Shri Harshadrai Laljibhai Kalathia was examined at Exh. 66 and on behalf of the defendant, one Shri Ram Chelaram Advani was examined at Exh. 165. Except these two witnesses, no other witness has been examined before the trial court by the either side. Relevant record was produced before the trial court which includes tender agreement, final bill, RA Bills and other relevant documents.

When the appeal was admitted, at the relevant time, records and proceedings were called for from the District Court, Jamnagar.At the time of final hearing of this appeal, when the original record was perused by us, certain important documents are missing. Alongwith the record and proceedings, copy of agreement, RA Bills, Measurement, Final Bill and other exhibits are not attached to the record and, therefore, directions were issued to the District Court, Jamnagar to supply the said documents but ultimately, the District Court, Jamnagar wrote a letter to this Court that they are not able to trace out the said documents from the court. Therefore, it was suggested to the learned AGP Mr. Patel to call for the relevant record from the department and the matter was therefore adjourned for three to four times. Ultimately, learned AGP Mr.Patel has been able to get only one document namely Tender Agreement arrived at between the parties and except that, no other documents are available which are relevant for the perusal of this Court.

According to the oral evidence of the plaintiff witness Shri H.L. Kalathia at Exh. 66, the contract was given to the original plaintiff on 29th November, 1970 and the same was required to be completed within 20 months i.e. on or before 28th July, 1972 but the work was completed in the end of August, 1973. It was also deposed by him at Exh.66 that the payments were required to be made by the Executive Engineer and the Measurement Book was written by the Executive Engineer according to the work carried out by the plaintiff, in presence of the plaintiff. It has been admitted by him that whatever measurements recorded by the Executive Engineer in the Measurement Book are correct and that bears the signature of the witness. According to him, on the basis of the said measurement book, the defendant present appellant had prepared the RA Bills which were in prescribed Form. According to the said witness, said bill was required to be prepared by the defendant as per the practice and it was also bearing signature of the original plaintiff; the original plaintiff has not prepared any bill either RA Bills or the Final fill and all the bills were prepared

by the concerned officer of the defendant. According to the said witness, after completion of the work, within three months, final bill was required to be prepared and the final bill in respect of the work in question was prepared on 31.3.1974 which was produced before the trial court at Mark 46/3 and it was admitted vide Exh. 69. According to the said witness, said final bill was shown to the said witness and it was signed by the Executive Engineer Shri Advani. Alongwith the final bill, there was technical note to justify that the final bill is correct according to the technical note. Said final bill and the technical note were examined by the employees of the department of the defendant. It was shown to the said witness examined at Exh. 66 and it was admitted by the said witness that the final bill and the technical note were correct but it was his defence that all the amounts were not mentioned for which the original plaintiff was entitled and, therefore, he accepted the final bill alongwith payment under protest. According to the said witness, whatever payments made by RA Bills were considered as advance payment and the some of the amounts were not included in the final bill and, therefore, the plaintiff wrote letters to the defendant, produced at Exh. 70 and 71 but according to him, no reply was given by the defendant and, thereafter, notice Exh. 72 was given to the defendant. Thereafter, said witness has narrated details about each claim made in the suit. Said witness has also admitted that as and when the tender was filled up by the contractor, whatever details and conditions, items and specifications mentioned in the tender are binding to each contractor. It was also admitted by him that in case if any quantity is less or in case if some more work is required to be performed, for that, normally, they were not claiming any more amount from the department. It has been admitted by the said witness that the additional claim was not made before the department in respect of each item. He has also admitted that because of these disputes, the work entrusted to him has not been abandoned by him and he completed the work. He also admitted that according to the agreement, if the quantity is less or more, they are bound by the terms and conditions of the agreement and they have to complete the work as per the terms and conditions of the agreement. He also admitted in his evidence at Exh. 66 that certain objections were raised by him against the measurement and according to the agreement, RA Bills and the final bills were required to be prepared by the original plaintiff. He has denied that the RA Bills and the Final Bills were accepted by the original plaintiff without any objection. He has also admitted that there was no such condition in the

agreement to give interest to the original plaintiff but he was required to borrow the fund for completion of the work and, therefore, he is claiming interest upon the said amount.

On behalf of the defendant, one Shri Ram Chelaram Advani has been examined at Exh. 165. Shri Advani was working as Executive Engineer in Jamnagar Irrigation Division for a period from 1973 to 1977. Said witness had prepared the final bill of the said contract. Said contract was executed in Form B-2 In the contract form, price of each item was mentioned and that was filled up by the original plaintiff. In tender agreement, specification of each of the items has been given and according to that, the original plaintiff was required to work and work progress was required to be given by the original plaintiff. According to the agreement, RA Bills and the final bill were required to be prepared by the contractor and if the contractor is not able to prepare the same, then, the department is required to prepare the RA Bills and the final bill. Alongwith the final bill, technical note was submitted by the overseer which was required to be considered by the sanctioning authority at the time of sanctioning the final bill. There was no condition in the agreement about rebate. There was no condition in the agreement that in case if the price is increased, then, the department has to pay any additional amount for increase in the price of each item. According to him, the defendant has not committed any breach of the agreement. Under the agreement, the work was required to be completed by the contractor as per the measurements. He has also admitted that there was delay in completion of the work by the contractor but that was satisfactory and therefore, no fine was imposed against the contractor. Otherwise, the department is entitled to impose fine for non completion of the work in time as per the contract. According to his evidence, the work was required to be completed within twenty months from 29.11.1970 to August, 1973 but it was not completed by that time and there was delay of about thirteen months in completing the work but for that, no fine has been imposed by the department upon the original plaintiff. He has also admitted that no dispute was raised by the original plaintiff till the date of receiving final payment on 31st March, 1974 but subsequently dispute was raised by the original plaintiff. Though the letter was written in July, 1974 by the plaintiff, but before that time, payment was already made to the original plaintiff and the department has given reply to the original plaintiff vide Exh. 71. As per his evidence, though the plaintiff has raised objection against the final bill and

accepted under protest, but it was not disclosed by the plaintiff before the department as to under which protest, he has been raising objection and why he has been accepting it under protest. According to his oral evidence, if any additional amount or excess payment was made to the contractor in the RA Bill, same was required to be adjusted by the department while preparing the final bill. Alongwith the final bill, technical note which was prepared by the department was accepted by him and for that, necessary endorsement has been made by him.

In light of the above oral evidence and the documents produced by the parties before it, the trial Court has examined the merits of the matter.

Learned A.G.P. Mr.M.K. Patel has submitted that as per clause 8 and 10 of the Agreement, RA Bills and the Final Bill were prepared by the Department and the same was accepted by the plaintiff under protest and, therefore, in such circumstances, according to the specific condition mentioned in both the clauses of the agreement namely clause 8 and 10 of the agreement, original plaintiff is not entitled to any amount from the appellant as alleged in the suit. He has also submitted that there was estoppel against the original plaintiff on the basis of the fact that the original plaintiff has accepted the RA Bill and the final bill prepared by the department and, therefore, original plaintiff is now not entitled to raise any objection against the payments which were made by the appellant in RA Bills and the Final Bill. He has also submitted that mere endorsement made in the final bill for accepting the payment as per final bill under protest is not sufficient for the plaintiff unless the same is substantiated and it is disclosed as to what is the objection of the original plaintiff against the final bill. According to him, in absence of such disclosure - specific objection, mere protest is not sufficient and the plaintiff is not entitled to claim or receive any amount from the appellant. He has also submitted that the final bill was accepted by the plaintiff on 31st March, 1974 and, thereafter, the plaintiff remained silent upto 16th July, 1976. On 16th July, 1976, the plaintiff served one notice and then served statutory notice to the present appellant on 4th January, 1977. In view of these facts, learned AGP Mr. M.K. Patel has submitted that the the original suit was the result of after thought of the original plaintiff because the plaintiff remained silent for a period of about two years and raised no objection for two years against the said payment and the moment period of three years was likely to expire, the plaintiff

issued notice and then statutory notice as stated above and then filed the suit against the appellant before the trial court. Therefore, according to his submission, conduct of the original plaintiff is also required to be taken into consideration. He has submitted that if the conduct of the original plaintiff is viewed, initially, the plaintiff failed to submit the RA Bills and then Final Bill to the department and, therefore, the department prepared the RA Bills and the Final Bill in terms of the agreement and thereafter, the plaintiff accepted the amount as per the final bill under protest without disclosing as to what was the nature of objection. After accepting the payment under protest, the plaintiff remained silent for a period of about two years and then issued notice and then statutory legal notice and filed the suit and therefore, on the basis of the conduct of the plaintiff, the department paid the amounts as per the RA Bills and the Final Bill and on that basis, entire agreement has been over and subsequently the plaintiff has raised objection and, therefore, in such circumstances, there was bar of estoppel against the plaintiff. He has submitted that the trial Court has considered two decisions as mentioned in paragraph 61 of the judgment one is the decision reported in AIR 1981 Calcutta 101 and the another is the decision reported in AIR 1974 SC 158. According to his submission, the trial court has committed error in relying upon the said decision while considering the aspect of estoppel and the said decisions were not applicable in the facts and circumstances of the case. According to him, the trial court has committed error in coming to the conclusion that the principles of estoppel is not applicable to the facts of the present case. He has also submitted that the trial court has erred in coming to the conclusion that it cannot be said that the plaintiff is estopped from filing the present suit after accepting the amount of final bill and after signing the bill. According to his submission, in view of the facts of the present case, the trial court ought to have held that the suit of the plaintiff is bared by the principles of estoppel and it ought not to have examined other aspects of the matter and the suit of the plaintiff ought to have been dismissed on that count without answering the other issues.

Learned advocate Mr. Dayani appearing for the respondent herein - original plaintiff has submitted that the trial court was right in appreciating the evidence on record; the trial court was right in relying upon the documents produced before it by the respective parties; trial court was right in answering issue no.15 and was

also right in relying upon the decisions reported in AIR 1981 Calcutta 101 as well as AIR 1974 SC 158. According to him, the final bill though it was prepared by the department, same was accepted by the plaintiff under protest and, therefore, the plaintiff is entitled to sue the defendant and to claim the suit amount from the defendant if he is satisfying and proving his claim before the trial court. He has also submitted that the plaintiff is entitled to claim the damages and the principles of estoppel would not come in his way because the plaintiff has proved the damages suffered by him. He has also submitted that the trial court was deciding the suit as a whole and was not deciding the issue of estoppel as a preliminary issue and, therefore, the trial court was perfectly justified in examining each claim made by the plaintiff and was also right in answering issue No.15 as well as the other issues in favour of the plaintiff.

Before examining the merits of the matter, it is necessary to consider first the contention raised by the learned AGP Mr. Patel that there was bar of estoppel against the plaintiff. It is the submission of Mr. Patel that the plaintiff was estopped from claiming damages against the department as the final bill was accepted by the original plaintiff; legal notice was served after about two years and the statutory notice was served upon the defendant by the original plaintiff on 4th January, 1977. For appreciating this contention raised by Mr. Patel, it is necessary to consider Clause 8 and 10 of the Agreement. It is not in dispute that the agreement was arrived at by and between the parties in Form No.B-2. As per clause 8, payments on intermediate certificate to be regarded as advances. Clause 10 of the agreement is relating to the bills to be submitted monthly. Clauses 8 and 10 of the said agreement are, therefore, reproduced as under:

"Clause 8.- No payment shall be made for any work estimated to cost less than Rs.1.000/- till after the whole of the said work shall have been completed and a certificate of completion given. But in the case of work estimated to cost more than Rs.1,000/-, the contractor shall, on submitting a monthly bill therefor, be entitled to receive payment proportionate to the part of the work then approved and passed by the engineer in charge whose certificate of such approval and passing of the sum so payable shall be final and conclusive against the contractor. All such

intermediate payments, shall be regarded as payments by way of advance against the final payments only and not as payments for work actually done and completed and shall not preclude the engineer in charge from requiring bad, unsound, imperfect or unskillful work to be removed and taken away and reconstructed or re-erected, nor shall any such payment be considered as an admission of the due performance of the contract or any part thereof in any respect of the occurring of any claim; nor shall it conclude, determine, or effect any way of the powers of the engineer in charge as to the final settlement and adjustments of the accounts or otherwise, or in any other way vary or affect the contract. The final bills shall be submitted by the contractor within one month of the date fixed for the completion of the work, otherwise the engineer in charge's certificate of the measurement and of the total amount payable for the work shall be final and binding on all parties.

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10. A bill shall be submitted by the contractor each month on or before the date fixed by the engineer in charge for all work executed in the previous months and the engineer in charge shall take or caused to be taken the requisite measurement for the purpose of having the same verified, and the claimed, so far as it is admissible, shall be adjusted, if possible within 10 days from the presentation of the bill. If the contractor does not submit the bill within the time fixed as aforesaid, the engineer in charge may depute a subordinate to measure up the said work in the presence of the contractor or his duly authorized agent whose counter signature to the measurement list shall be sufficient warrant, and the engineer in charge may prepare a bill from such list which shall be binding on the contractor in all respects."

Thus, according to clause 8 of the said agreement referred to hereinabove, the final bills shall be submitted by the contractor within one month of the date fixed for the completion of the work, otherwise the engineer in charge's certificate of the measurement and of the total amount payable for the work shall be final and binding on all parties.

Bare reading of clause 10 of the said agreement makes it clear that a bill shall be submitted by the contractor each month on or before the date fixed by the engineer in charge for all work executed in the previous months and the engineer in charge shall take or caused to be taken the requisite measurement for the purpose of having the same verified, and the claimed, so far as it is admissible, shall be adjusted, if possible within 10 days from the presentation of the bill. If the contractor does not submit the bill within the time fixed as aforesaid, the engineer in charge may depute a subordinate to measure up the said work in the presence of the contractor or his duly authorized agent whose counter signature to the measurement list shall be sufficient warrant, and the engineer in charge may prepare a bill from such list which shall be binding on the contractor in all respects.

In the instant case, it is an admitted fact that the plaintiff has not prepared the RA Bills or the Final Bill. It is also not coming from the record that any objections were raised at any point of time by the plaintiff against the measurements recorded by the department. Since the RA Bills and the Final Bill were not prepared by the plaintiff, the appellant prepared such RA Bills and the Final Bill on the basis of the measurements recorded by the department. No objection was raised by the plaintiff against such RA Bills while receiving payments as per the RA Bills. There is no correspondence to that effect on the record of this case. Similarly, since the Final Bill was not prepared by the plaintiff, ultimately, it was prepared by the department through its engineer in charge which was verified by the plaintiff as it appears from the record and it was found to be correct. Then the final bill was accepted by the plaintiff under protest. Therefore, the language used in these two clauses is required to be considered in light of these admitted facts. As per the language used in these two clauses, whatever RA Bills prepared by the department as well as the Final Bill prepared by the department are binding to the contractor himself i.e. original plaintiff in all respects. Therefore, as per the language of these two clauses, after receiving full payment as per the final bill prepared by the department, the original plaintiff is not entitled to claim any damages from the department. No doubt such payment as per final bill was accepted by the plaintiff under protest. However, after accepting such payment as per final bill under protest, it was necessary for the

plaintiff to clarify and specify as to what objection he is having and why he is raising protest. From the evidence on record, it is clear that no objection has been disclosed by the plaintiff before the department at the time of receiving full payment as per the final bill from the department. No details of any grievance has been disclosed by the original plaintiff before the department while receiving the full payment as per the final bill from the department. According to our opinion, mere endorsement to the effect that the plaintiff has been accepting the amount as per the final bill under protest without disclosing real grievance on merits is not sufficient and it amounts to accepting the final bill without any valid objection or grievance on merits by the plaintiff. After accepting the payment as per final bill from the department under protest, the plaintiff remained silent for a period of about two years as it appears from the record. One notice was given after about two years and except that, prior to such notice, there was no any correspondence between the parties in respect of the acceptance of the final bill under protest. One statutory notice was given on 4th January, 1977 after simple notice which was given in the year 1976. In view of these facts, if the oral evidence of the plaintiff is appreciated, the plaintiff has admitted that as the period of limitation was likely to expire, therefore, he served statutory notice to the department and then filed the suit as aforesaid before the trial court. The evidence on behalf of the plaintiff is clear in that regard. In para 14 of the oral evidence of the witness for the plaintiff at Exh. 66, it has been deposed by the said witness that after completion of the work, within three months, final bill was required to be prepared and it was prepared on 31st March, 1974 which was shown to him and it was prepared by the Executive Engineer Shri Advani. Alongwith the Final Bill, there was technical note which was examined by him and according to him, it was found proper and correct. Similarly, it was also admitted by him that the final bill was also found to be e correct but further deposed that in the final bill, all the amounts were not mentioned. In view of this oral evidence of the plaintiff witness at Exh. 66, it is clear that the RA Bills as well as the Final Bill were prepared by the department; the Final Bill accompanied by the technical note were found to be correct. From the oral evidence of the witness for the plaintiff, it is clear that the RA Bills were not prepared by the plaintiff; objections were not raised by the plaintiff against the measurement recorded by the department on the basis of which the RA Bills were prepared and after accepting the final bill of

course under protest, after a period of two years, grievance or objection has been raised in detail before the department by issuing notice and subsequently on 4th January, 1977, statutory notice was issued to the defendant. Such conduct on the part of the plaintiff is indicating that the original plaintiff has by his conduct accepted the final bill and the department has made full payment to the original plaintiff and subsequently objections were raised by issuing statutory notice and, therefore, according to our opinion, the suit of the plaintiff was clearly barred by the principles of estoppel and, therefore, the plaintiff was estopped from claiming any damages from the department. It is also necessary to note that in light of clause 8 and 10 of the agreement which are binding to the original plaintiff, and according to clause 8 and 10 of the Agreement, the RA Bills and the Final Bills prepared by the department and accepted by the contractor plaintiff are binding to the contractor in all respects and therefore in view of clause 8 and 10 of the agreement also, the plaintiff was estopped from claiming any damages from the department. In view of that, as per our opinion, the plaintiff was not entitled to claim any amount from the department by way of damages. It is also equally important to appreciate the deposition of the witness for the appellant at Exh. 165. In para 17 of his evidence, Mr. Advani, witness for the appellant has deposed that in case of any increase in the prices, the contractor is not entitled to claim any amount from the department. According to his oral evidence, there was no such condition which would entitle the contractor to claim and/or receive the amount on account of increase in price; there was no any condition of payment of interest to be paid to the contractor by the department. As per his evidence at Exh. 165, there was no condition for rebate in the agreement. In light of this oral evidence of the parties and also considering the language used in clause 8 and 10 of the agreement, principles of estoppel are applicable in the facts and circumstances of the present case. As per section 115 of the Indian Evidence Act, when one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing. Therefore, in view of the definition of estoppel under section 115 of the Evidence Act, and also considering the facts of the present case, RA Bills were not prepared by the plaintiff but the same were prepared by the department as per the measurements recorded by the

department; similarly, Final Bill was also not prepared by the plaintiff but the same was prepared by the department; against such measurements recorded by the department for preparing the RA Bills, the plaintiff has not filed any objection nor has raised any protest; RA Bills as well as the Final Bill, both were accepted by the plaintiff. So far as the RA Bills are concerned, the plaintiff has not raised any objection or protest but at the time of final bill, the plaintiff has accepted the same under protest but at the relevant time while accepting the final bill under protest, the plaintiff has not given details as to why he has been accepting it under protest and the plaintiff after accepting the bill under protest, remained silent for a period of two years as stated earlier and issued the statutory notice only on 4th January, 1977 to the defendant in furtherance of the protest registered by him while accepting the final bill dated 31.3.1974. Therefore, considering the entire facts on record and also looking to clause 8 and 10 of the agreement and the language used therein, according to our opinion, principles of estoppel would apply to this case because in this case, initially the plaintiff has, by his act of omission in not preparing the RA Bills and then by not raising objection against the recording of measurement by the department permitted the department to believe the measurement recorded by the department to be true and correct and the plaintiff has also not raised any objection against the RA Bill prepared by the department but protest has been registered only on 31.3.1974 at the time of final bill which too was prepared as per the measurements recorded by the department against which no objection was raised by the plaintiff at any point of time. Even after registering his protest against the Final Bill on 31.3.1974, the plaintiff remained silent for a period of two years. Therefore, according to our opinion, the conduct of the plaintiff was such which would estop the plaintiff from raising any dispute against the final bill. It is more so in view of the language used in clause 8 and 10 of the agreement. Therefore, according to our considered opinion, there was clear bar of estoppel against the plaintiff and the plaintiff was estopped by his own act and/or omission from bringing any claim or suing the defendants. Principles of estoppel are based on the principle that it would be unequitable and unjust if one person by representation made or by conduct amounting to representation had induced another to act as he would not otherwise have done, person who made representation should not be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who acted on it. Therefore, according to our opinion,

while deciding issue no. 15, the trial court has not properly considered the contention raised by the appellant as regards estoppel. The trial court has come to the conclusion that so far as the RA Bills are concerned, they are ad.hoc payments and so far as the final bill is concerned, the original plaintiff has accepted the same under protest and, therefore, acceptance of final bill under protest does not estop the plaintiff from bringing the claim. Before coming to such conclusion, the trial court ought to have examined relevant conditions mentioned in clause 8 and 10 provided in the agreement in Form B-2. While deciding issue NO. 15, the trial court has considered two decisions, one in case of Jiwani Engineering Works (P) Ltd. v. Union of India reported in AIR 1981 Calcutta 101 and the other in case of Damodar Valley Corporation v. K.K. Kar, reported in AIR 1974 SC 158. In case of Jiwani Engineering Works (P) Ltd. v. Union of India reported in AIR 1981 Calcutta 101, the award made by the arbitrator was challenged on the ground that the contractor executed no claim certificate in favour of Union of India for which certain work was done under the contract. It was observed by the Calcutta High Court that there is no question that by granting no claim certificate, the contractor becomes disentitled to refer any dispute which arises out of the contract of arbitration under arbitration clause in the works agreement between the parties. In the case before the Calcutta High Court, whether there is any no claim certificate or not itself was the dispute which was referred to the arbitration and covered under the arbitration clause. The arbitrator was having jurisdiction to decide the same. It has also been held by the Calcutta High Court in the said decision that it is well known and a notorious fact that unless a no claim certificate is issued by the contractor payment of final bill will not be made. But that does not prevent the contractor from raising its claim before arbitrator in terms of arbitration clause for value of his work or other claims within scope of agreement between parties. Award is not liable to be set aside on this ground.

Thus, this was the question and the observations made by the Calcutta High Court in the said decision. Looking to the facts of the present case, it is clear that the claim made by the original plaintiff is not based upon the agreement. It was not the case of the plaintiff herein that the plaintiff has claimed damages on the basis of the agreement. Clause 8 and 10 of the agreement provides that if the contractor has not prepared the RA Bills and the final bill, then, the same

shall be prepared by the engineer in charge and ultimately the RA Bills and the final bill are binding to the contractor in all respects. Therefore, the analogy applied by the learned trial Judge on the basis of the decision of the High Court of Calcutta is not applicable to the facts of the present case. In the case before the Calcutta High Court, the question was that after issuing no claim certificate by the contractor, whether the contractor is entitled to raise any claim against the department or not. The claim raised by the contractor in the said case was the claim under agreement of arbitration clause and not beyond that. Looking to the facts of the present case and also considering the oral evidence of the witnesses and also considering the language of clause 8 and 10 of the agreement in Form B-2, it is clear that the claim of the plaintiff was not based upon the agreement and, therefore, according to our opinion, the trial court has committed error in answering issue No. 15 on the basis of the decision of the Calcutta High Court.

If the decision in case of in case of Damodar Valley Corporation v. K.K. Kar, reported in AIR 1974 SC 158 is taken into consideration, in the said decision, it has been held by the apex court as under:

> "Held that the question whether there had been a full and final settlement of a claim under the contract was itself a dispute arising 'upon' or 'in relation to' or 'in connection with' the contract. A claim for damages was a dispute or difference which arose between the respondent and the appellant and was 'upon' or 'in relation to' or 'in connection with' the contract, and the reference to the arbitrator by the respondent was not barred."

Thus, in the said decision, the question examined by the apex court was whether there had been a full and final settlement of a claim under the contract was itself a dispute arising 'upon' or 'in relation to' or 'in connection with' the contract. Looking to the facts of the present case, there was no such dispute to the effect that there was any full and final settlement between the parties or not because initially, RA Bills were not prepared by the plaintiff but the same were prepared by the department on the basis of the measurements recorded by the department against which no objections were raised by the plaintiff and then the final bill was prepared by the department which was accepted by the plaintiff under protest but while registering protest, the plaintiff has

not given any details about protest to the final bill which, according to the provisions contained under clause 8 and 10 of the agreement, was final and binding to the plaintiff in all respects and, therefore, according to the contract, considering clause 8 and 10 of the agreement, the plaintiff is not entitled to claim damages from the defendants. Even if the deposition of the witness for the plaintiff is considered, payment is required to be made by the Executive Engineer and the Measurement Book was written by the Executive Engineer in presence of the plaintiff or agent of the plaintiff each month and the said witness has also admitted that whatever measurements recorded in the measurement book are correct. It is not coming from the record that any objection has ever been raised by the plaintiff against such measurements recorded in the measurement book. On that basis, RA Bills were prepared by the department in prescribed form and after preparing the RA Bills, the department was obtaining signatures from the said witness for the plaintiff. Therefore, in view of this evidence of the witness for the plaintiff, whatever measurements recorded in the measurement book has been considered as correct and the RA Bills and the Final Bill were prepared by the department on the basis of the said measurement book. There is nothing on record to show that while signing the measurements recorded in the measurement book, the plaintiff has objected about the same. Therefore, naturally, RA Bills as well as the Final Bill are the result of the measurements recorded in the Measurement Book and if the plaintiff has been having any objection against the measurements recorded in the Measurement Book, then, why he has not stopped the work; why he has not raised objection against recording of such measurements in the measurement book? Therefore, in view of this entire evidence led before the trial court and also considering clause 8 and 10 of the agreement, and keeping in mind the conditions incorporated in clause 8 and 10 of the agreement, were of the view that the claim of damages made by the plaintiff was barred by the principles of estoppel. While considering the decision of the Calcutta High Court, the trial court has not considered the language of clause 8 and 10 of the agreement and in doing so, the trial court has committed error. We are, therefore, of the view that the trial court has committed error in answering issue no.15 in favour of the plaintiff. We are also of the view that the two decisions considered by the trial court while deciding issue no.15 were not applicable to the facts of the present case. We are of the view that once it is held by us that the claim of damages made by the original plaintiff was barred by the principles of estoppel, then,

it is not necessary for us to go into details of each claim made by the plaintiff in the suit.

We have carefully considered the oral and documentary evidence on the record, available before this Court. We have not reappreciated the oral evidence of the plaintiff and the defendant but have properly read the oral evidence of the plaintiff and the defendant. Proper reading of the oral evidence is not amounting to reappreciation of the evidence. We have considered the examination-in-chief and the cross examination of the plaintiff and the defendant, as a whole. The claim of the plaintiff was based upon the delay occurred in completion of the work and on that basis, the plaintiff claimed damages, interest and other amounts. The claim of the plaintiff was not based upon the agreement. It was also not arising as a part or condition of the tender agreement. It was an additional claim beyond the scope of the tender agreement. The claim which was made by the plaintiff in the suit is contrary to the terms and conditions of the tender agreement. For that, there was no any provision made in the tender agreement entitling the plaintiff to claim additional amount from the defendant. According to the tender agreement, whatever total amounts were required to be paid to the plaintiff were paid by the defendant to the plaintiff. For that, the plaintiff is not having any objection or the grievance against the defendant. Meaning thereby, the defendant has paid full amount as agreed between the parties, according to the tender agreement. The suit claim is not for any remaining amount as per the tender agreement but due to delay in completion of work as per the tender agreement, the plaintiff has created this additional claim about the establishment charges, interest and damages. For that, there was no such condition incorporated in the tender agreement so that the plaintiff can claim such amount as per the tender agreement. The tender agreement is binding to the plaintiff and whatever work done during the entire period of contract was required to be recorded in the Measurement Book by the concerned officer of the defendant in presence of the plaintiff. Said measurement book was bearing signature of the plaintiff. At that time, no objection or protest has been raised by the plaintiff against recording of such measurements in the Measurement Book. Meaning thereby, whatever measurements recorded in the Measurement Book in the presence of the plaintiff were correct and no objection was raised by the plaintiff against such measurements recorded in the Measurement Book. On the basis of the Measurements recorded in the Measurement Book, RA Bills were prepared

which were also signed by the plaintiff. Therefore, periodical work including additional work, if any, carried out by the plaintiff has been recorded in the Measurement Book and on that basis, RA Bills were prepared and paid to the plaintiff which were accepted by the plaintiff without raising any protest or objection and ultimately on that basis, final bill was prepared by the department and the final payment was also made to the plaintiff. This being the conduct of the plaintiff, clearly establish the fact that no claim whatsoever of the plaintiff remained with the defendant which would require any payment to the plaintiff by the defendant. The obligation upon the plaintiff to prepare the RA Bills and final bills but not to prepare and that to prepare by the defendants and received the final payment which estopped the plaintiff to challenge the correctness of the RA Bills and the Final Bill. The plaintiff was not able to justify before the trial court that as per the tender agreement, the plaintiff is entitled to have the total amount after completion of the tender work and ultimately how much amount has been received by the plaintiff from the defendant and then the plaintiff can claim the remaining amount but these facts have not been disclosed by the plaintiff before the trial court. Meaning thereby, at the time of recording of the measurements in the Measurement Book, whatever additional work carried out by the plaintiff as per the suggestion of the defendant was included in the RA Bills. Similarly, it was also taken into account while preparing the final bill. Therefore, according to our opinion, the claim of the plaintiff is not based upon the tender agreement and the plaintiff was paid the amount payable to him as per the tender agreement by the defendant and, therefore, looking to these facts, oral evidence and the conduct on the part of the plaintiff, according to our opinion, the plaintiff is estopped to claim any amount from the defendant as per the tender agreement.

In view of the above observations and discussion, we are of the view that the judgment and decree passed by the learned Civil Judge,(S.D.), Jamnagar in Special Civil Suit No. 30 of 1977 dated 14.12.1982 are required to be quashed and set aside and the suit of the plaintiff is required to be dismissed.

Accordingly, this appeal is allowed. The judgment and decree passed by the learned Civil Judge,(S.D.), Jamnagar in Special Civil Suit No. 30 of 1977 dated14.12.1982 are hereby quashed and set aside and the suit of the plaintiff is hereby dismissed with no order as to costs.

The original plaintiff has made withdrawal of the amount as decreed by the trial court in view of the interim order passed by this Court on 27th January, 1984. Initially, this court permitted the plaintiff to withdraw the amount on condition of giving bank guarantee to the satisfaction of the trial court which was subsequently modified on 25th April,1984 and instead of bank guarantee, it was directed that the security sufficient in the opinion of the lower court may be accepted by the lower court.

Learned advocate Mr.Dayani appearing for the respondent original plaintiff has submitted that the original plaintiff has given security before the trial court and the amount in question with interest has been withdrawn by the original plaintiff. In view of these facts, it is directed to the respondent herein original plaintiff to deposit the amount in question with 6 per cent interest from the date of filing of the suit till the date of deposit within four months from today. In case if the original plaintiff fails to deposit the said amount as directed hereinabove, then, it will be open for the appellant to recover the said amount from the original plaintiff with 6 per cent per annum in accordance with law.

In view of the above order passed by us on the first appeal, cross objection No.36 of 2002 filed by the original plaintiff qua remaining amount not decreed by the trial court shall not survive. Accordingly, the cross objections filed by the respondent original plaintiff are dismissed with no order as to costs.

7.10.2002. (Kshitij R. Vyas,J.)

(H.K.Rathod,J.)

Vyas